86-1148

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CAROLYN V. HOGAN,
Petitioner
V.

MYRTLE SPRINGS REVERTED
INDEPENDENT SCHOOL DISTRICT and
WILLS POINT INDEPENDENT SCHOOL DISTRICT,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

THOMAS W. GEORGE, ESQ.
Counsel of Record
STEPHEN W. SATHER, ESQ.
315 Westgate Building
1122 Colorado Street
Austin, Texas 78701
(512) 477-9651

ATTORNEYS FOR PETITIONER
CAROLYN V. HOGAN

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ATTORNEYS FOR PETITIONER
CAROLYN V. HOGAN

QUESTION PRESENTED

WHETHER THE MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT DEPRIVED CAROLYN V. HOGAN OF HER PROPERTY WITHOUT DUE PROCESS OF LAW WHEN IT TERMINATED HER PRINCIPAL'S CONTRACT WITHOUT PRIOR NOTICE AND A HEARING AND IN VIOLATION OF ITS OWN WRITTEN POLICIES?

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No. _____

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CAROLYN V. HOGAN,
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V.

MYRTLE SPRINGS REVERTED
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WILLS POINT INDEPENDENT SCHOOL DISTRICT,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Carolyn V. Hogan, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Texas Supreme Court entered in the above-entitled case on September 10, 1986.

OPINIONS BELOW

The judgment of the Texas Supreme Court, which is herein sought to be reviewed, is reprinted in the Appendix to this Petition, p. A-1. The Order of the Texas Supreme Court denying Motion for Rehearing is reprinted in the Appendix to this Petition, p. A-2. The opinion of the Court of Appeals, which is reported at 705 S.W.2d 707, is reprinted in the Appendix to this Petition, pp. A-3 to A-8. The judgment of the Court of Appeals is reprinted in the Appendix to this Petition, p. A-9. The Findings of Fact and Conclusions of Law of the District Court of Travis County, Texas are reprinted in the Appendix to this Petition, pp. A-10 to A-13. The judgment of the District Court of Travis County, Texas is reprinted in the Appendix to this Petition, pp. A-14 to A-16. The Order of the Texas Board of Education is reprinted in the Appendix to this Petition, p. A-17. The Decision of the Commissioner of Education is reprinted in the Appendix to this Petition, p. A-18. The Proposal for Decision of the Texas Education Agency is reprinted in the Appendix to this Petition, pp. A-19 to A-25.

JURISDICTION

The judgment of the Texas Supreme Court was entered September 10, 1986. A timely Motion for Rehearing was filed, which was denied on October 15, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This is a procedural due process case. Carolyn Hogan was hired by the Myrtle Springs Independent School District as a teacher in 1967 and was promoted to principal in 1969. 1 S.F. 64, 65. In 1971, Ms. Hogan, the Myrtle Springs School Board and the Van Zandt County School Board developed an elaborate set of policies governing dismissal and non-renewal. 1 S.F. 105.

The policies established, in pertinent part that:

> "Whenever the services of an employee are to be discontinued by dismissal or failure to renew an appointment, he shall have been advised of the reason and he shall have been given the opportunity to improve the quality of these services without delay."
>
> "If a teacher has not received an official warning of unsatisfactory service by the principal on or before May 1, he shall consider that his contract will be extended for a period of not less than the next school year. The initiative for this warning shall be issued as soon as the unsatisfactory condition develops."

P.X. 18.

On April 11, 1977, Carolyn Hogan was dismissed from her position as principal at a meeting of the Myrtle Springs School Board. Ms. Hogan was first informed of the decision when one of the teachers at her school told Ms. Hogan that he had been

offered her job. 1 S.F. 91. Carolyn Hogan was called in by the Board and told that they wanted her to step down as principal. 1 S.F. 91. When she asked why, Board President James Ashworth stated, "Because I think it would be better that a man run the job than a woman." 1 S.F. 91. Ms. Hogan then asked if there were any grievances against her. She was told that there were grievances, but that the Board would not disclose them. 1 S.F. 91-92. At this point, Carolyn Hogan was told to resign as principal or be fired. 1 S.F. 92. It is uncontroverted that Carolyn Hogan was not given a warning of unsatisfactory service or an opportunity to improve before being fired. P.X. 19, p. 10.

On May 9, 1977, at the next School Board meeting, Carolyn Hogan was presented with a list of eight grievances against her. 1 S.F. 92. None of the reasons for non-renewal as specified in the School Board's policies were given. After hearing evidence and testimony on this list of reasons, the Hearings Officer for the Texas Education Agency ruled that they were "at best, pathetic." P.X. 19, p. 11.

The Myrtle Springs School District was subsequently merged into the Wills Point Independent School District, which assumed all of its liabilities. TR 147.

Since her termination, Ms. Hogan has attempted to gain any job as teacher, part-time principal or principal in her area. 1 S.F. 125-128. Ms. Hogan was refused employment at the Wills Point School District even though twelve teachers and one principal were hired from 1977-1983. 1 S.F. 143.

Carolyn Hogan duly perfected her appeal of the action of the Myrtle Springs School Board to the Van Zandt County School Board. After a hearing on June 23, 1977, the Van Zandt County School Board sustained the action of the Myrtle Springs School Board.

Ms. Hogan then perfected her appeal to the Commissioner of Education of the Texas Education Agency. On May 21, 1980,

the Hearings Examiner issued his Proposal for Decision, which was adopted without modification by the Commissioner of Education on July 7, 1980. The opinion adopted by the Commissioner of Education concluded that Carolyn Hogan had been denied her principal's post in violation of the School Board's written procedures, but denied relief based on failure to mitigate damages and mootness. Carolyn Hogan perfected her appeal to the Texas Board of Education, which affirmed the Commissioner of Education on September 13, 1980.

Ms. Hogan subsequently appealed to the District Court of Travis County, Texas. In a letter opinion dated December 13, 1982, District Judge Harley Clark reversed the rulings on failure to mitigate damages and mootness and remanded to the Texas Education Agency for determination of damages. By subsequent agreement of the parties and the Court, the issue of damages was heard by the District Court. After an evidentiary hearing on October 3, 1983, the District Court awarded damages of $105,984.00 and attorney's fees of $17,000.00 against Myrtle Springs Reverted Independent School District and the Wills Point Independent School District. The District Court judgment was entered on July 13, 1984.

The Myrtle Springs and Wills Point School Districts perfected their appeal to the Texas Court of Appeals. On November 5, 1985, the Texas Court of Appeals for the Sixth District reversed the judgment of the District Court and rendered a take-nothing judgment. The Court of Appeals ruled that Carolyn Hogan's contract had been breached by the failure of the School District to follow its own written procedures, but that Ms. Hogan could not recover the damages awarded by the District Court. On Motion for Rehearing, the Court of Appeals amended its opinion to add that the judgment of the District Court was not based upon a violation of due process.

Carolyn Hogan filed an Application for Writ of Error with

the Texas Supreme Court, which was refused on September 10, 1986. A timely filed Motion for Rehearing was denied on October 15, 1986.

FEDERAL QUESTION RAISED

Petitioner Carolyn V. Hogan raised the federal question of Due Process in her Hearing Complaint filed before the Texas Education Agency on December 2, 1977. Petitioner's appeal to the District Court of Travis County, Texas was based upon denial of the relief sought in the Hearing Complaint. The Appellant School Districts brought the issue of Due Process before the Court of Appeals by filing a Point of Error concerning Due Process. Appellee Carolyn V. Hogan responded by filing a Due Process Counterpoint. In her Motion for Rehearing in the Court of Appeals, Carolyn Hogan filed four Points of Error seeking to affirm the District Court judgment based upon Due Process. In the Texas Supreme Court, Carolyn Hogan brought Due Process Points of Error in her Application for Writ of Error and Motion for Rehearing.

REASONS FOR GRANTING WRIT

This is a case in which a principal with teaching duties was removed from her principal's position without prior notice and a hearing and in violation of the School District's written policies. The Writ of Certiorari should be issued under Supreme Court Rule 17, which provides, in pertinent part:

> "Rule 17. Considerations governing review on certiorari
>
> . 1 . A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . .

> (c) When a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court."

Petitioner will show in this Petition that the Texas Supreme Court ruling denying Carolyn Hogan relief for violation of her due process rights conflicts with a long line of decisions of this Court, culminating in *Cleveland Board of Education v. Loudermill,* 470 U.S. ____, 84 L.Ed. 2d 494, 105 S.Ct. 1487 (1985).

Petitioner will further show that this is an important case. Due process is among the most valued rights contained in the United States Constitution.

> "It is procedure that spells out much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Douglas J., concurring). In the present case, there have been profound violations of Carolyn Hogan's right to due process. The State courts have failed to redress these wrongs. This Court should assert its role as protector of the Constitution to correct the State Court judgment. See *Martin v. Hunter's Lessee,* 14 U.S. 304, 1 Wheat. 304, 4 L.Ed. 97 (1816).

The Due Process clause of the Fourteenth Amendment provides " . . . nor shall any state deprive any person of life, liberty, or property without due process of law." The Due Process clause applies where there is a protected interest in life, liberty or property. *Board of Regents v. Roth,* 408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701 (1972), *Perry v. Sinderman,* 408 U.S. 593, 33 L. Ed.2d 570, 92 S. Ct. 2694 (1972). "(O)nce it

is determined that the Due Process Clause applies, 'the question remains what process is due.' " *Cleveland Board of Education v. Loudermill, supra,* 84 L. Ed.2d 503.

In the present case, Petitioner Carolyn Hogan had a property interest in her contract under the policies of the Myrtle Springs School District. Property interests are defined by reference to state law. In *Board of Regents v. Roth,* this Court stated:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement."

408 U.S. at 577.

Personnel policies have been specifically held to constitute "rules or understandings" giving rise to property rights. In *Perry v. Sinderman, supra,* this Court held that provisions in a college's Faculty Guide and guidelines promulgated by the Coordinating Board of the Texas College and University System could create a property right of contract renewal. Personnel policies were also held to create property rights in *Bueno v. City of Donna,* 714 F.2d 484 (5th Cir. 1983); *Daly v. Sprague,* 675 F.2d 716 (5th Cir. 1982); *Ashton v. Civiletti,* 613 F.2d 923 (D.C. Cir. 1979); *Burnaman v. Bay City Independent School District,* 445 F. Supp. 927 (S.D. Tex. 1978).

In the present case, the Texas Court of Appeals has held that the policies of the Myrtle Springs School District formed a part of Carolyn Hogan's contract as principal:

> "The regulations and operational policies adopted by a school board before making a contract of employment with a teacher form part of the contract, and the teacher's

> employment is subject thereto. *Bowen v. Callallen Indep. School Dist.*, 603 S.W.2d 229 (Tex. Civ. App. - Corpus Christi 1980, writ ref'd n.r.e.); *Romeike v. Houston Indep. School Dist.*, 368 S.W.2d 895 (Tex. Civ. App. - Waco 1963, no writ); *Arlington Indep. School Dist. v. Weekley*, 313 S.W.2d 929 (Tex. Civ. App. - Fort Worth 1958, writ ref'd n.r.e.). Therefore, the school district's failure to follow the procedures for nonrenewal set out in its own written policies when it decided not to renew Hogan's part-time principal's position breached its contract with Hogan."

Myrtle Springs Reverted Independent School District v. Hogan, 705 S.W.2d 707, 709 (Tex. App. - Texarkana, 1985, writ ref. n.r.e.). The Court of Appeals specifically held that the policies applied to Carolyn Hogan's contract under the applicable Texas law. This ruling was not disturbed by the Texas Supreme Court. Under the policies, Carolyn Hogan had a property right in her contract.

The dimensions of the property right were defined by the policies to include: a right to a warning of unsatisfactory service, an opportunity to improve and, in the absence of a warning of unsatisfactory service before May 1, a contract renewal for one year.

Because she had a property right in her contract, Carolyn Hogan was entitled to receive due process. At a minimum, Ms. Hogan was entitled to pretermination notice and a hearing.

> "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). We have described the 'root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed.2d 113, 91 S. Ct. 780 (1970) (emphasis in

> original); see *Bell v. Burson*, 402 U.S. 535, 542, 29 L. Ed.2d 90, 91 S. Ct. 1586 (1970). This principle required 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth*, 408 U.S., at 569-570, 33 L. Ed.2d 548, 92 S. Ct. 2701; *Perry v. Sinderman*, 408 U.S. 593, 599, 33 L. Ed.2d 570, 92 S. Ct. 2694 (1972)."

Cleveland Board of Education v. Loudermill, supra, at 84 L. Ed.2d 503-04.

In the present case, Carolyn Hogan was not given pre-termination notice or a hearing. The first notice that Carolyn Hogan received that she would not continue as principal was when a teacher under her told her that the job had been offered to him. 1 S.F. 91. She was then summarily called into the April 11, 1977 meeting of the School Board and told that the Board preferred a man as principal and that she would have to either resign or be fired. 1 S.F. 91-92.

Carolyn Hogan was not given any opportunity for a hearing at the April 11, 1977 meeting. Although she was told that there were grievances against her, the Board refused to disclose them. 1 S.F. 91-92.

The situation in the present case is closely analogous to the situation in *Burnaman v. Bay City Independent School District, supra,* where the Court stated:

> "The court concludes and finds that the real decisions with reference to Jerry Burnaman were made by the Board acting behind closed doors at the executive sessions of March and April, and that Jerry Burnaman was deprived of the protection against arbitrary action which a hearing is designed to afford."

445 F. Supp. at 931.

In this case, the decision to remove Carolyn Hogan as principal was made before she was ever informed that her

position was in jeopardy. The School Board acted arbitrarily behind closed doors without considering Ms. Hogan's position.

The post-termination hearing on May 9, 1977 was clearly insufficient to serve the interests protected by a pre-termination hearing. This Court has identified those interests as follows:

> "First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.
>
> . . .
>
> "Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."

Cleveland Board of Education v. Loudermill, supra, at 84 L. Ed.2d 504.

The post-termination hearing did not protect Carolyn Hogan's interest in her job. She had previously been fired on April 11 and was not restored to her position on May 9.

The post-termination hearing was not calculated to reach an accurate result either. Although Ms. Hogan presented numerous witnesses in her favor, the School Board did not even vote on whether to retain Ms. Hogan as principal. 1 S.F. 94. At the meeting, the School Board presented Ms. Hogan with a list of eight grievances against her. 1 S.F. 95. The Hearings Examiner who heard testimony as to these "grievances" concluded that they were without merit, as a matter of fact, "pathetic":

> "Respondents deny any ulterior motives as alleged by Petitioner. From the evidence presented in this cause, however, Respondents' assertions appear incredible, especially in light of the list of grievances prepared by Respondent MSRISD in an effort to justify its action. It should be noted that, as justification for termination or nonrenewal,

> the eight grievances enumerated by Respondent MSRISD were, at best pathetic."

P.X. 19, p. 11.

Clearly, as in the *Burnaman* case, the School Board reached its decision behind closed doors prior to the post-termination hearing and was not interested in considering contrary evidence.

Based upon even the minimum standards applicable, it is clear that Carolyn Hogan was denied due process. Carolyn Hogan was not given pre-termination notice or a hearing. The post-termination "hearing" provided was grossly inadequate. However, the Myrtle Springs School was not only bound by the constitutional minimum, but by the procedures it had promulgated as well.

This Court has held that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen . . ." *Service v. Dulles*, 354 U.S. 369, 372, 77 S. Ct. 1152, 1 L. Ed.2d 1403 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed.2d 1012 (1959).

> "When published rules and regulations establish a particular statutory procedure for the termination of a teacher's employment, they may add to the constitutional minimum. If they do, such regulations must also be followed."

Ferguson v. Thomas, 430 F.2d 582, 586 (5th Cir. 1970); *Rogers v. Masem*, 774 F.2d 328 (8th Cir. 1985); *Wells v. Dallas Independent School District*, 576 F. Supp. 497 (N.D. Tex. 1983); *accord, White v. South Park Independent School District*, 693 F.2d 1163 (5th Cir. 1982) ("[T]he due process clause does require an agency to follow its own established procedures"); *Burnaman v. Bay City Independent School District, supra* ("Failure of the Government to follow its own duly promulgated rules and published policies violates a citizen's right to procedural due process").

The policies of the Myrtle Springs School District gave Carolyn Hogan additional rights. The policies required that the School District give a warning of unsatisfactory performance "as soon as the unsatisfactory condition develops." Before the services of an employee could be discontinued "he shall have been given the opportunity to improve the quality of these services without delay." Further, "If a teacher has not received an official warning of unsatisfactory service by the principal on or before May 1, he shall consider that his contract will be extended for a period of not less than the next school year."

Carolyn Hogan was not afforded the procedural rights granted by these policies. The Texas Court of Appeals found that:

> "The manner in which the Myrtle Springs school district failed to renew Hogan's part-time principal's position violated its own written policies. The district did not give any reason for nonrenewal of her principal's position or an opportunity to improve before the decision was made not to renew her position. Nor did it give Hogan a warning of unsatisfactory service before May 1. In fact, it gave no reasons for the failure to renew her position until May 9."

Myrtle Springs Reverted Independent School District v. Hogan, supra, at 709. Failure of the School District to follow its own written policies constituted an additional violation of due process.

Petitioner Carolyn Hogan was denied procedural due process when she was removed from her position as principal. Under the policies of the Myrtle Springs School District, Ms. Hogan had a property right in her contract. This property right was taken from her without prior notice and a hearing and in violation of the School District's written policies.

Carolyn Hogan seeks damages for lost earning capacity

and mental anguish and seeks her attorney's fees. A party may properly recover for lost earning capacity resulting from denial of procedural due process. Lost earning capacity and injury to reputation are closely related. The stigma of a wrongful dismissal forecloses employment opportunities, resulting in loss of earning capacity. Damages for injury to professional reputation have been recognized in several cases. *Endicott v. Huddleston*, 644 F.2d 1208 (7th Cir. 1980); *Wells v. Dallas Independent School District, supra; Schreffler v. Board of Education of Delmar School District*, 506 F. Supp. 1300 (D. Del. 1981); *Cochran v. Chidester School District*, 456 F. Sup. 390 (W.D. Ark. 1978).

Dimunition of earning capacity may also be awarded by analogy to "front pay" in employment discrimination cases. Front pay "equals the difference between the salary received at the time the judgment is entered and what the plaintiff should have made with his former employer until the assumed retirement date." *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1018 (W.D. Mo. 1984); *Blim v. Western Electric Company, Inc.*, 731 F.2d 1473 (10th Cir. 1984).

Damages for mental anguish, *Carey v. Piphus*, 435 U.S. 255, 98 S. Ct. 1042, 55 L. Ed.2d 252 (1978); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982); *Laje v. R. E. Thomason General Hospital*, 665 F.2d 724 (5th Cir. 1982) and attorney's fees, *Vanelli v. Reynolds School District No. 7, supra, Laje v. R. E. Thomason General Hospital, supra; Brown v. Bullard Independent School District*, 640 F.2d 651 (5th Cir. 1981) may properly be awarded in due process cases.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner Carolyn V. Hogan respectfully prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Texas in No. C-4970, *Hogan v. Myrtle Springs Reverted Independent School District and Wills Point Independent School District*, and that upon granting of the Petition that the judgment of the Court below be reversed, that this cause be remanded, and for such other relief at law, and in equity, to which she may be entitled.

Respectfully submitted:

THOMAS W. GEORGE, ESQ.
STEPHEN W. SATHER, ESQ.,
315 Westgate Building
1122 Colorado Street
Austin, Texas 78701
(512) 477-9651

By: _____
Thomas W. George

CERTIFICATE OF SERVICE

I, Thomas W. George, a member of the Bar of the Supreme Court of the United States and counsel of record for Carolyn V. Hogan, Petitioner herein, hereby certify that on _____, 198 ____, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Myrtle Springs Reverted Independent School District and Wills Point Independent School District, Respondents herein, by depositing such copies in the United States Post Office, Austin, Texas, with first class postage prepaid, properly addressed to the post office address of James Raup, Esq., the above-named Respondents' counsel of record at McGinnis, Lochridge & Kilgore, 919 Congress Avenue, Austin, Texas, 78701; and

On Wills Point Independent School District, Respondent herein by depositing such copies in the United States Post Office, Austin, Texas, with first class postage prepaid, properly addressed to the post office address of Gordon R. Wynne, Jr., Esq., the above-named Respondent's counsel of record at Wynne & Wynne, P.O. Box 487, Wills Point, Texas, 75169.

All parties required to be served have been served.

Dated: _____

_____

Thomas W. George, Esq.
315 Westgate Building
1122 Colorado Street
Austin, Texas 78701

APPENDIX

SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

October 15, 1986

Mr. Thomas W. George
315 Westgate Building
1122 Colorado Street
Austin, TX 78701

Mr. James R. Raup
McGinnis, Lochridge & Kilgore
1300 Capital Center
919 Congress Avenue
Austin, TX 78701

Mr. Gordon R. Wynne, Jr.
Wynne & Wynne
137 W. James Street
Wills Point, TX 75169

RE: Case No. C-4970

STYLE: *CAROLYN V. HOGAN V.*
MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT, ET. AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above-styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 10, 1986

Mr. Thomas W. George
315 Westgate Building
1122 Colorado Street
Austin, TX 78701

Mr. James R. Raup
McGinnis, Lochridge & Kilgore
1300 Capital Center
919 Congress Avenue
Austin, TX 78701

Mr. Gordon R. Wynne, Jr.
Wynne & Wynne
137 W. James Street
Wills Point, TX 75169

RE: Case No. C-4970

STYLE: *CAROLYN V. HOGAN V.*
MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT, ET. AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above-referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ Blanca E. Morin
Deputy

Court of Appeals
Sixth District
Texarkana, Texas

No. 9357

Myrtle Springs Reverted Independent School District and Wills Point Independent School District, Appellants	)	Appealed from the 261st Judicial District Court
V.	)	
Carolyn V. Hogan, Appellee	)	of Travis County, Texas

BEFORE, CORNELIUS, C.J., BLEIL AND CHADICK, JJ.*

Myrtle Springs Reverted Independent School District and Wills Point Independent School District appeal a judgment of $105,984.00 as damages for a diminution of earning capacity and $17,000.00 as attorney's fees for breach of Carolyn Hogan's employment contract with the Myrtle Springs Reverted Independent School District. Hogan files a cross-point of error seeking damages for mental anguish. The issues concern whether the Myrtle Springs School District breached its contract with Hogan when it did not renew her part-time principal's position and, if the contract was breached, the proper measure of damages. We find that the school district did breach its contract with Hogan, but that the consequential damages of loss of earning capacity and mental anguish cannot be recovered in this suit for breach of employment contract.

Carolyn Hogan worked for several years as a part-time prin-

*Honorable T. C. Chadick, Justice, Supreme Court of Texas, Retired, sitting by Assignment.

cipal and full-time teacher in the Myrtle Springs school district. On April 11, 1977, the Myrtle Springs school board asked her to resign her part-time principal's job or be fired. Although she specifically asked for a list of grievances on April 11, the school board did not give her any reasons for her dismissal at that time. Hogan turned down the teacher's contract she was offered for the 1977-78 school year. She requested a formal hearing by the school board concerning her part-time principal's position, and the board agreed to hold a formal hearing on May 9. At that hearing, the board gave Hogan a list of eight grievances and affirmed its earlier decision not to renew her part-time principal's position. The list of grievances contained none of the reasons for dismissal listed in the Myrtle Springs school district board policies for 1976-77. During the summer of 1977, the Myrtle Springs Reverted Independent School District was annexed by and consolidated into the Wills Point Independent School District. Hogan appealed the nonrenewal of her part-time principal's position through administrative channels up to the district court of Travis County. The trial court found that Myrtle Springs had breached its contract with Hogan, awarded her $105,984.00 as damages for a 33 1/3% permanent diminution of earning capacity and $17,000.00 as attorney's fees, but denied her recovery of damages for mental anguish caused by the breach of contract.

The Myrtle Springs school board policies for 1976-77 provide:

> Whenever the services of an employee are to be discontinued by dismissal or failure to renew an appointment, he shall have been advised of the reason and he shall have been given the opportunity to improve the quality of these services without delay.
>
> . . .
>
> If a teacher has not received an official warning of unsatisfactory service by the principal on or before May 1, he

> shall consider that his contract will be extended for the period of not less than the next school year. The initiative for this warning shall be issued as soon as the unsatisfactory condition develops.

The contract between the school district and Ms. Hogan for the 1976-77 school year contains this statement:

> It is agreed that the said teacher shall discharge under this contract the duties required in accordance with the school laws of Texas, the regulations of the State Commissioner of Education, the local school board, and the County Superintendent of Public Instruction of said county. It is further agreed that no verbal agreement entered into between the teacher and trustees not covered by this contract and no written agreement, aside from this contract, shall become a part of this contract or bind either of the parties to the same.

The manner in which the Myrtle Springs school district failed to renew Hogan's part-time principal's position violated its own written policies. The district did not give any reason for the nonrenewal of her principal's position or an opportunity to improve before the decision was made not to renew her position. Nor did it give Hogan a warning of unsatisfactory service before May 1. In fact, it gave no reasons for the failure to renew her position until May 9.

The regulations and operational policies adopted by a school board before making a contract of employment with a teacher form part of the contract, and the teacher's employment is subject thereto. *Bowen v. Calallen Indep. School Dist.*, 603 S.W.2d 229 (Tex Civ. App. - Corpus Christi 1980, writ ref'd n.r.e.); *Arlington Indep. School Dist. v. Weekley,* 313 S.W.2d 929 (Tex. Civ. App. - Fort Worth 1958, writ ref'd n.r.e.). Therefore, the school district's failure to follow the procedures for nonrenewal set out in its own written policies when it decided not to renew Hogan's part-time principal's position breached

its contract with Hogan.

In an action for breach of contract, damages may be recovered for loss that is natural, probable and foreseeable consequence of the defendant's breach. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex.1981). This rule on the forseeability of contract damages dates back to the case of *Hadley v. Baxendale*, 9 Exch. 341, 354 (1854), in which the court stated:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonable be considered either arising naturally; i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.

The majority of American jurisdictions follow this rule and it is recognized by the Restatement (Second) of Contracts. Restatement (Second) of Contracts, Section 365 (Tent. Draft No. 14, 1979); *Mead v. Johnson Group, Inc.*, supra.

We have some guidance concerning what damages are the natural, probable and foreseeable consequences of the breach of an employment contract. The general rule as to the correct measure of damages for breach of an employment contract is the present cash value of the contract to the employee if it had not been breached, less any amounts that he should be able to earn through other employment using reasonable diligence. *Greater Fort Worth & Tarrant County Community Action Agency v. Mims*, 627 S.W.2d 149 (Tex. 1982). The trial court did not award Hogan these damages, namely, the value of the contract less the amount of mitigation. However, in this appeal she makes no complaint of the trial court's failure to award her these damages. Rather, she seeks to uphold damages for loss of

earning capacity and mental anguish caused by the breach of the contract. Because damages for loss of earning capacity and mental anguish do not come within the rule as to foreseeable damages in breach of employment contract cases, the award of these damages cannot be sustained.

Traditionally, damages for loss of earning capacity and mental anguish are recovered in personal injury suits. *See Dallas Ry. & Terminal Co. v. Guthrie,* 146 Tex. 585, 210 S.W.2d 550 (1948); *McIver v. Gloria,* 140 Tex. 566, 169 S.W.2d 710 (1943); *T.J. Allen Distrib. Co. v. Leatherwood,* 648 S.W.2d 773 (Tex. App. - Beaumont 1983, writ ref'd n.r.e.); *Soriano v. Medina,* 648 S.W.2d 426 (Tex. App. - San Antonio 1983, no writ). Actions for breach of employment contacts do not allow recovery of damages for loss of earning capacity. *See Greater Fort Worth & Tarrant County Community Action Agency v. Mims,* supra; *Sheshunoff & Co. v. Scholl,* 564 S.W.2d 697 (Tex. 1978). However, Hogan's suit against the school district, to the extent that it is grounded in tort, could not succeed because of the district's governmental immunity. *Cummins v. Board of Trustees of Eanes Indep. School Dist.,* 468 S.W.2d 913 (Tex. Civ. App. - Austin 1971, no writ); *Russell v. Edgewood Indep. School Dist.,* 406 S.W.2d 249 (Tex. Civ. App. - San Antonio 1966, writ ref'd n.r.e.). Although Hogan initially sought to recover in tort in the trial court, she has not challenged the district's immunity from her tort actions on appeal. Hogan is barred from recovering damages in the tort from the school district; this Court cannot allow her to recover what are essentially tort damages against the school district in a suit for breach of an employment contract. *See Russell v. Edgewood Indep. School Dist.,* supra.

Courts in several other states have held that in an action by a teacher for wrongful discharge or breach of an employment contract, damages for mental anguish or impairment of future earning capacity and injury to professional reputation

are not recoverable. *Skagway City School Board v. Davis,* 543 P.2d 218 (Alaska 1975); *Miller v. Board of Education of School Dist. No. 132,* 240 N.E.2d 471 (Ill. App. Ct. 1968); *Winship v. Brewer School Comm.,* 390 A.2d 1089 (Me. 1978). In *Skagway,* the Supreme Court of Alaska held that a wrongfully discharged teacher is entitled to the amount of her salary for the unexpired term of employment, less what she could earn by making diligent efforts to obtain similar employment and is not entitled to damages for injury to reputation and loss of earning capacity. The court denied recovery of damages for injury to reputation and loss of earning capacity because those damages could not reasonable be presumed to have been within the contemplation of the parties when they entered into the contract. *Skagway City School Board v. Davis,* supra at 225.

Damages for loss of earning capacity and for mental anguish are ordinarily recoverable in tort actions. We conclude that Hogan cannot recover these damages in a suit for breach of an employment contract against an employer immune from tort liability.

Myrtle Springs additionally complains that the trial court erred in rendering judgment for Hogan because the school district did not, as a matter of law, violate her right to due process of law. No basis exists for this complaint. The findings of fact and conclusions of law demonstrates that the trial court did not predicate its judgment on any violation of Hogan's procedural due process rights.

We reverse the trial court's judgment and render judgment that Hogan take nothing by virtue of her suit.

/s/ Charles Bleil

Charles Bell
Associate Justice

December 4, 1985
Filed December 4, 1985

JUDGMENT

BE IT REMEMBERED that on Wednesday the 4th day of December, A.D. 1985, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Charles Bleil, Associate Justice, T. C. Chadick, Justice, Supreme Court of Texas, Retired, sitting by assignment, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others were had, to-wit:

No. 9357

Myrtle Springs Reverted Independent School District and Wills Point Independent School District, Appellants	)	Appealed from the 261st Judicial District Court
V.	)	
Carolyn V. Hogan, Appellee	)	of Travis County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts and upon the briefs and oral argument of the parties; and the Court, after considering the same, is of the opinion and finds there was error in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court be, and hereby is, in all things REVERSED and judgment here RENDERED that Carolyn V. Hogan take nothing by virtue of her suit, in conformity with the written opinion of this Court of even date on file herein; that appellee Carolyn V. Hogan shall pay all court costs extended in behalf of this appeal, whether in this Court or in the court below, for which let execution issue; and that this judgment be certified to the court below for observance.

No. 314, 187

CAROLYN V. HOGAN	)	IN THE DISTRICT
	)	
V.	)	
	)	
TEXAS EDUCATION AGENCY, THE MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT, THE WILLS POINT INDEPENDENT SCHOOL DISTRICT, AND THE VAN ZANDT COUNTY SCHOOL BOARD	)	COURT OF TRAVIS COUNTY, TEXAS 261ST JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury on the 3rd day of October, 1983. The plaintiff, Carolyn V. Hogan, appeared in person and by her attorneys and announced ready for trial. The defendants, Myrtle Springs Reverted Independent School District, Wills Point Independent School District, and the Van Zandt County School Board appeared by their attorneys and announced ready for trial. After considering the pleadings, the evidence, the arguments and briefs from counsel, the Court, in response to a request from the Myrtle Springs Reverted Independent School District and the Wills Point Independent School District, Defendants, makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. Plaintiff worked for years as a part-time principal and full-time teacher at the Myrtle Springs school where she had written checks and kept the school books, planned menus,

performed janitorial services, helped design the library, done carpentry and painting, regularly attended school board meetings, helped to get the school's creditation reinstated, helped write some of the school board's policies, all while teaching first, second and third grades and attending graduate school where she received a Master's degree after which she commenced work on a Ph.D.

2. The school board summarily failed to renew Plaintiff's principalship.

3. The manner in which the Myrtle Springs Independent School District failed to rehire Plaintiff as a part-time principal was in violation of its own written policies, which formed a part of its contract with her.

4. Plaintiff refused to accept a proffered teaching contract.

5. Plaintiff's refusal of the teaching contract was reasonable, given the circumstances.

6. By failing to follow its own policies in not renewing Plaintiff's principalship contract, it was foreseeable by the school board that Plaintiff would decline the offered teaching contract.

7. The school board's breach was a proximate cause of mental anguish suffered and to be suffered by Plaintiff.

8. Plaintiff now finds herself not acceptable for hire as a teacher or administrator in an education career field highly sensitive to situations such as contract nonrenewal.

9. The school board's breach was a proximate cause of Plaintiff's stigma and consequent ostracism from the educator's world.

10. Plaintiff has suffered 33 1/3% permanent diminution of earning capacity for 24 years.

11. The reasonable value of Plaintiff's permanent diminution of earning capacity is $105,984.00.

12. Plaintiff has been obliged to retain services of an attorney to prosecute her cause of action.

13. The reasonable value of Plaintiff's attorney's fees is $17,000.00.

14. The relationship between the Van Zandt County School Board and the Myrtle Springs Independent School District was uncertain and unclear.

15. Prior to the 1977-78 school year, Myrtle Springs Reverted Independent School District was consolidated with and was absorbed by the Wills Point Independent School District.

16. As a result of said consolidation, all liabilities and obligations, including teacher and principal employment contracts, as well as all assets of the Myrtle Springs Reverted Independent School District were assumed by the Wills Point Independent School District.

Conclusions of Law

1. Texas law accords Plaintiff no remedy for any mental anguish.

2. Plaintiff is not required to prove the availability of funds to cover damages sought as a prerequisite to liability on the part of the Myrtle Springs Reverted Independent School District and the Wills Point Independent School district.

3. The Texas Education Agency is not liable to Plaintiff and is retained in this action as a nominal party only.

4. No liability is imposed on the Van Zandt County School Board.

5. Plaintiff shall have and recover from the Myrtle Springs Reverted Independent School District and the Wills Point Independent School District, jointly and severally, the sum of $105,984.00 as damages and $17,000.00 as attorney's fees.

6. The above-described award to Plaintiff bears interest at the legal rate beginning July 13, 1984 until paid.

7. Plaintiff's case is not barred by limitations.

Signed this 10th day of August, 1984.

/s/ Harley Clark
HARLEY CLARK
District Judge
250th Judicial District Court
Travis County, Texas

No. 314, 187

CAROLYN V. HOGAN	)	IN THE DISTRICT
	)	
V.	)	
	)	
TEXAS EDUCATION AGENCY, THE MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT, THE WILLS POINT INDEPENDENT SCHOOL DISTRICT, AND THE VAN ZANDT COUNTY SCHOOL BOARD	)	COURT OF TRAVIS COUNTY, TEXAS 261ST JUDICIAL DISTRICT

JUDGMENT

On the 3rd day of October, 1983, came on to be heard the above-entitled and numbered cause. The plaintiff, Carolyn V. Hogan, appeared in person and by her attorneys and announced ready for trial. The defendants, Myrtle Springs Reverted Independent School District, Wills Point Independent School District, and the Van Zandt County School Board appeared by their attorneys of record and announced ready for trial. The Court found on September 26, 1983, that the Texas Education Agency was a nominal party only and not liable to the plaintiff. No jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and the arguments of counsel as well as the briefs submitted by counsel, is of the opinion that the plaintiff is entitled to recover of and from the defendants Myrtle Springs Reverted Independent School District and Wills Point Independent School District, jointly and severally, the sum of $105,984.00 as damages for 33 1/3% per-

manent diminution of earning capacity and $17,000.00 for attorney's fees. No liability is imposed on the Van Zandt County School Board.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiff, Carolyn V. Hogan, have and recover from the defendants Myrtle Springs Reverted Independent School District and Wills Point Independent School District, jointly and severally, the sum of $105,984.00 as damages and $17,000.00 for attorney's fees with interest thereon at the legal rate from the date of judgment and thereafter.

All costs of Court expended or incurred in this cause are hereby adjudged against defendants Myrtle Springs Reverted Independent School District and Wills Point Independent School District.

Plaintiff Carolyn V. Hogan is awarded such writs and process as may be necessary in the enforcement and collection of this judgment.

Upon finality of this judgment, the Court shall issue a writ or writs of mandamus compelling the appropriate officials for defendants Myrtle Springs Reverted Independent School District and Wills Point Independent School District to pay this judgment.

All relief not expressly granted herein is denied.

SIGNED this 13th day of July, 1984.

/s/ Harley Clark
Harley Clark
District Judge
250th District Court
Travis County, Texas

APPROVED AS TO FORM:
JAMES R. RAUP
McGINNIS, LOCHRIDGE & KILGORE

RepublicBank Building, Fifth Floor
900 Congress Avenue
Austin, Texas 78701

/s/ James R. Raup
James R. Raup

GORDON WYNNE, JR.
WYNNE & WYNNE
137 W. James Street
Wills Point, Texas 75169

/s/ Gordon Wynne, Jr.
Gordon Wynne, Jr.

TOMMY W. WALLACE
Criminal District Attorney
Van Zandt County Courthouse
Canton, Texas 75103

/s/ Tommy W. Wallace
Tommy W. Wallace

JIM MATTOX
Attorney General of Texas
Supreme County Building
Austin, Texas 78711

By: /s/ Kevin Thomas O'Hanlon
Assistant Attorney General

THOMAS W. GEORGE, P.C.
MARK E. FOSTER
GEORGE & GEORGE
315 Westgate Building
1122 Colorado Street
Austin, Texas 78701

By: /s/ Thomas W. George
Thomas W. George

DOCKET No. 77-R-78

CAROLYN V. HOGAN	)	BEFORE THE STATE
	)	
V.	)	
	)	BOARD OF EDUCATION
MYRTLE SPRINGS	)	
INDEPENDENT	)	
SCHOOL DISTRICT	)	THE STATE OF TEXAS

ORDER

BE IT KNOWN that on this date came on to be heard Petitioner's appeal in the above-styled and numbered matter, and after due consideration, it is hereby

ORDERED that this appeal be, in all things, DENIED, and the order of the Commissioner of Education entered on the 7th day of July, 1980, is hereby AFFIRMED and the findings of fact and conclusions of law therein adopted.

SIGNED AND ENTERED the 13th day of SEPTEMBER, 1980.

/s/ Joe Kelly Butler
JOE KELLY BUTLER, CHAIRMAN
STATE BOARD OF EDUCATION

ATTEST:

/s/ Paul Matthews
PAUL MATTHEWS, SECRETARY
STATE BOARD OF EDUCATION

DOCKET No. 77-R-78

CAROLYN V. HOGAN	)	BEFORE THE STATE
	)	
V.	)	
	)	BOARD OF EDUCATION
MYRTLE SPRINGS	)	
INDEPENDENT	)	
SCHOOL DISTRICT	)	THE STATE OF TEXAS

DECISION TO THE COMMISSIONER

BE IT KNOWN that on this date came on for consideration by the Commissioner of Education the above-styled and numbered cause, wherein on April 24, 1979, a hearing was conducted by a hearing officer who made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law, WHICH PROPOSAL FOR DECISION IS ATTACHED, AND IS HEREBY ADOPTED AND MADE A PART HEREOF FOR ALL PURPOSES.

IT IS THEREFORE ORDERED that after due consideration of the evidence, matters of record, and matters of official notice, this appeal be, in all things, DENIED.

SIGNED AND ENTERED this 7th day of JULY 1980.

/s/ Alton O. Bowen
ALTON O. BOWEN
COMMISSIONER OF EDUCATION

DOCKET No. 77-R-78

CAROLYN V. HOGAN	)	BEFORE THE STATE
	)	
V.	)	
	)	BOARD OF EDUCATION
MYRTLE SPRINGS	)	
INDEPENDENT	)	
SCHOOL DISTRICT	)	THE STATE OF TEXAS

PROPOSAL FOR DECISION

Statement of the Case

Carolyn V. Hogan, Petitioner, brings this appeal from an action of the Board of Trustees of the Myrtle Springs Reverted Independent School District (MSRISD), Respondent, whereby an election was made not to renew Petitioner's term contract of employment as a classroom teacher and part-time principal. Petitioner also includes as Respondents, the Wills Point Independent School District (WPISD) and Van Zandt County School Board (VZCSB). This appeal was heard on April 24, 1979, before David P. Ryan, General Counsel and Hearing Officer. Upon Mr. Ryan's recusal, Robert L. Howell was appointed as Hearing Officer. Petitioner was represented by Thomas W. George and Patrick J. Feeney, Attorneys at Law, Austin, Texas. Respondents were represented by Richard Ray, Attorney at Law, Canton, Texas, and Richard Davis, Van Zandt County District Attorney.

The Appeal

Petitioner was first hired by Respondent MSRISD in August 1968, as a classroom teacher pursuant to a one year term contract of employment. In 1970, Petitioner's contract was renewed and amended expanding her duties to include those of part-time principal. Petitioner received an annual increase of approx-

imately $350 as compensation for the additional duties. Petitioner continued to serve in this capacity through 1976-77 school year.

On April 11, 1977, Petitioner was summoned before a regular meeting of the Board of Trustees of Respondent MSRISD and informed that her contract as a teacher and part-time principal would not be renewed for the 1977-78 school year. Instead, Petitioner was offered a contract to serve exclusively as a classroom teacher with a corresponding reduction in salary. Petitioner rejected the offer and demanded to know the reasons for her nonrenewal. The Board of Trustees indicated that the board had some "grievances" regarding Petitioner's job performance, but declined to specify their nature.

At all times pertinent to this appeal, Respondent MSRISD had in full force and effect a written policy pertaining to dismissal and nonrenewal of employees. The policy is set forth verbatim as follows:

> "Whenever the services of an employee are to be discontinued by dismissal or failure to renew an appointment, he shall have been advised of the reason and he shall have been given the opportunity to improve the quality of these services without delay."

Respondent MSRISD's policies also provided as follows:

> "If teacher has not received an official warning of unsatisfactory service by the principal on or before May 1, he shall consider that his contract will be extended for the period of not less than the next school year. The initiative for this warning shall be issued as soon as the unsatisfactory condition develops."

It is uncontroverted that prior to the April 11, 1977 Board meeting, Petitioner had never been appraised of the existence of any complaints or grievances regarding her professional performance as a teacher or a principal.

On May 9, 1977, Petitioner was given a hearing before the Board of Trustees of Respondent MSRISD. At that hearing, the decision of April 11, 1977 not to renew Petitioner's contract was affirmed, and Petitioner was provided with a written list of eight grievances regarding her professional performance as principal. Petitioner appealed this decision to Respondent VZCSB and was granted a hearing on June 23, 1977, which culminated in no action being taken to reverse the previous decisions of Respondent MSRISD. Petitioner now brings her appeal before the State Commissioner of Education.

Come now Respondents with their Motion to Dismiss.

Findings of Fact

After consideration of all evidence, matters of record, and matters officially noticed, in my capacity as Hearing Officer, I make the following findings of fact:

1. Petitioner was first employed by Respondent MSRISD in August, 1968, as a classroom teacher pursuant to a one year term contract of employment.

2. In 1970, Petitioner's employment contract was renewed and amended expanding Petitioner's duties to include those of part-time principal. Petitioner continued in that capacity through the 1976-77 school year.

3. On April 11, 1977, Petitioner was summoned before a regular session of the Board of Trustees of Respondent MSRISD and was advised that, though Petitioner's contract would be renewed for the 1977-78 school year, the contract would encompass teaching duties only and that Petitioner would no longer serve as part-time principal. Moreover, the deletion of the principalship would result in a reduction in salary of approximately $350 annually. Petitioner was advised that there had been some "grievances" relating to Petitioner's performance as principal. Petitioner's demand for publication of the grievances was denied.

4. On May 9, 1977, the Board of Trustees of Respondent MSRISD granted Petitioner a hearing concerning her nonrenewal. During the course of the hearing, Petitioner was informed of eight grievances relating to her performance as principal. Petitioner was also informed that the action of April 11, 1977 was affirmed.

5. The written policies of Respondent MSRISD governing dismissals and nonrenewals of employees provide as follows:

> "Whenever the services of an employee are to be discontinued by dismissal or failure to renew an appointment, he shall have been advised of the reason and he shall have been given the opportunity to improve the quality of these services without delay."

The written policy of Respondent MSRISD also provide as follows:

> "If a teacher has not received an official warning of unsatisfactory service by the principal on or before May 1, he shall consider that his contract will be extended for the period of not less than the next school year. The initiative for this warning shall be issued as soon as the unsatisfactory condition develops."

6. Petitioner had never been appraised of the existence of any complaints or grievances relating to her performance as principal prior to April 11, 1977, and was not made aware of the substance of those grievances prior to May 9, 1977.

7. On June 23, 1977, Petitioner was granted a hearing before Respondent VZCSB, during which the action by Respondent MSRISD on April 11, 1977 was affirmed.

8. Subsequent to the close of the 1976-77 school year and prior to the beginning of the 1977-78 school year, the MSRISD consolidated with and was absorbed by the WPISD.

9. In the course of consolidating with Respondent MSRISD, Respondent WPISD resolved to provide teaching

positions for all of Respondent MSRISD's employee teachers who were offered renewal contracts.

Discussion and Conclusions of Law

Discussion

Respondent MSRISD clearly violated its written policies by the manner in which Petitioner's contract was nonrenewed. The policies flatly require that an employee must be appraised of any work-related deficiencies and given an opportunity to improve before any action of dismissal or nonrenewal may be taken. It is uncontroverted that Respondent MSRISD did not publish its grievances until well after Petitioner was made aware that her contract would not be renewed. Respondents strenuously urged that, in electing not to renew Petitioner's contract as part-time principal, Respondent MSRISD was motivated solely by the consideration of possible future consolidation with Respondent WPISD. Respondents deny any ulterior motives as alleged by Petitioner. From the evidence presented in this cause, however, Respondents' assertions appear incredible, especially in light of the list of grievances prepared by Respondent MSRISD in an effort to justify its action. It should be noted that, as justification for termination or nonrenewal, the eight grievances enumerated by Respondent MSRISD were, at best, pathetic. Were this appeal limited to these issues and facts, Petitioner would most certainly be entitled to reinstatement with back pay.

Respondents' argument that all issues were rendered moot by the consolidation of Respondent MSRISD and Respondent WPISD is without merit as all obligations and liabilities, as well as assets of Respondent MSRISD, are assumed by Respondent WPISD. Therefore, it must be determined if Petitioner may look to Respondent WPISD for relief as a result of the inappropriate behavior on the part of Respondent MSRISD.

Petitioner's nonrenewal differs from most instances in that Petitioner was not totally denied employment. Petitioner was offered the opportunity to continue teaching. Only Petitioner's duties as part-time principal were deleted from her employment contract. Thus, Petitioner had the option to continue teaching while asserting her appeal opposing the nonrenewal of her duties as principal. Moreover, Petitioner had the affirmative duty to so act in order to mitigate her damages. [Restatement of Contracts Section 336(1)] Having elected to decline the entire offering of Respondent MSRISD, Petitioner may not now claim monetary damages resulting from her failure to teach. At most, Petitioner would be entitled to the salary increment that she would have received for the additional duties of part-time principal. Therfore, any liability on the part of Respondent WPISD would be limited to this amount.

Additionally, Respondents have the unquestioned authority to nonrenew an employee teacher as a result of a necessary reduction in personnel notwithstanding the written policy in question. The uncontroverted facts establish that, following the consolidation of Respondent MSRISD and Respondent WPISD, no principalship positions were available within the WPISD. Therefore, regardless of the inappropriateness of Respondent MSRISD's actions, Petitioner must still be denied relief as a result of the unavailability of the position. Indeed, it is noteworthy that even had both Petitioner's duties as teacher and part-time principal been renewed by Respondent MSRISD, the consolidation of the two districts would still have denied Petitioner employment as principal.

The record does not reflect sufficient evidence upon which findings or conclusions can be rendered regarding Petitioner's claim of gender-based discrimination.

Conclusions of Law

After consideration of all evidence, matters of record, matters officially noticed, and the afore-mentioned findings of fact, in my capacity as Hearing Officer, I conclude that the elections by the MSRISD and the VSCSB not to renew Petitioner's employment contract with respect to her duties as part-time principal were unlawful. It is also concluded that Petitioner had the affirmative duty to mitigate her damages by continuing with her teaching duties as offered by Respondent MSRISD, and that her failure to so act effectively bars any claim Petitioner might have resulting from a loss of salary from those duties. It is concluded that, as no principalship positions were available within the WPISD subsequent to its consolidation with the MSRISD, Petitioner's claims for damages resulting from the inappropriate and unlawful nonrenewal of her contractual duties as principal is rendered moot as a result of a necessary reduction in personnel. I also conclude that, as all Petitioner's claims are either barred for failure to mitigate damages or rendered moot by the consolidation of the two school districts, Respondents' Motion to Dismiss should be GRANTED and that Petitioner's appeal should be, in all things, DENIED.

RECOMMENDATION

After due consideration of the evidence, matters of record, matters officially noticed, and the foregoing findings of fact and conclusions of law, it is hereby RECOMMENDED that Respondents' Motion to Dismiss be GRANTED, and Petitioner's appeal should be, in all things, DENIED.

SIGNED AND ENTERED the 21st day of May, 1980.

/s/ Robert L. Howell
ROBERT L. HOWELL
HEARING OFFICER

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1148

In The
Supreme Court of the United States
October Term, 1986

CAROLYN V. HOGAN,

Petitioner,

V.

MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT and WILLS POINT INDEPENDENT SCHOOL DISTRICT,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Texas

RESPONDENTS' BRIEF IN OPPOSITION

COUNSEL OF RECORD:
SHANNON H. RATLIFF

JAMES R. RAUP
McGINNIS, LOCHRIDGE & KILGORE
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTION RESTATED

Whether a public employer's nonrenewal of a term contract for part-time administrative duties after notice of the reasons therefor and a hearing violates the procedural due process guarantees of the fourteenth amendment to the United States Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Myrtle Springs Reverted Independent School District and Wills Point Independent School District respectfully request that this Court deny the petition for writ of certiorari for the reasons stated below.

STATEMENT OF JURISDICTION

Respondents believe that there is substantial doubt whether the alleged federal issue in this case was presented to and decided by the Texas state courts. Petitioner pleaded the fourteenth amendment in her pleading filed with the Texas Education Agency, but she did not litigate this issue in the Texas trial court. She contended only that her contract had been breached by a nonrenewal of part-time administrative duties and that she should be awarded mental anguish damages and loss of earning capacity damages for the alleged breach of her employment contract. The Texas Court of Appeals reviewed the trial court's judgment and concluded that the judgment was not based in any respect on procedural due process. The Texas Supreme Court did not disturb this holding. Petitioner pleaded but did not try her claim under the fourteenth amendment, and the Texas state courts did not decide a federal issue. Thus, this Court lacks jurisdiction over this case. If, however, the Court determines that jurisdiction does exist, the petition for writ of certiorari should be denied as will be shown below.

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STATEMENT OF THE CASE

This is a contract nonrenewal case which was tried in the district court of Travis County, Texas, as a breach of contract case under Texas law. Petitioner contended at trial and on appeal that the nonrenewal of her part-time duties was a breach of her employment contract. The opinion of the Texas Court of Appeals, which the Texas

Supreme Court refused to review, identified the issues on appeal to be whether Respondent Myrtle Springs breached Petitioner's employment contract "when it did not renew her part-time principal's position and, if the contract was breached, the proper measure of damages." *Myrtle Springs Reverted Independent School District v. Hogan*, 705 S.W.2d 707, 708 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.). The Court of Appeals' opinion contains many of the facts relevant to this Court's consideration of the petition for certiorari, although the Court of Appeals occasionally incorrectly used the terms "dismissal" and "nonrenewal" interchangeably. The terms, of course, describe two very different acts by an employer and have substantive legal differences and consequences which are significant for this case, which Petitioner now contends to be a procedural due process case.

Respondents take issue with several misstatements and mischaracterizations made by Petitioner in the petition. She repeatedly characterizes her loss of part-time administrative duties as a "dismissal" or as a "removal." Perhaps this characterization is understandable because her attorney must know that only a dismissal during a contract's term implicates the due process clause, but it is a blatant misrepresentation of the record and the undisputed facts of this case.

Respondent Myrtle Springs employed Petitioner for the 1976-77 school year on a ten-month term contract which expired by its own terms at the end of that school year. (PX 9). Petitioner's employment under this term contract for 1976-77 was as a full-time elementary school teacher and as a part-time principal. *Id.* For 1977-78 Respondent Myrtle Springs offered Petitioner a teacher's

contract, which she refused, but did not renew her part-time administrative duties. (1 SF 164, 167; PX 19 at 406). Respondent Myrtle Springs' Board of Trustees first informed Petitioner of its intention not to renew her administrative duties at its April 11, 1977 meeting, but the Board took no formal action at that meeting. (PX 19 at 407).

At Petitioner's request and before the expiration of her 1976-77 contract, the Board notified her of the reasons for nonrenewal and granted Petitioner a public hearing on May 9, 1977, at which she was represented by counsel and at which she and persons speaking for her defended her position and attempted to refute the reasons for nonrenewal. (PX 19 at 342-43, 407; 1 SF 92-94, 167-71). At the close of this hearing, the Board reconsidered its earlier decision but reaffirmed its intent to offer Petitioner only a teacher's contract for 1977-78. (PX 19 at 397). Most important, Petitioner completed the entire term of her 1976-77 contract. (1 SF 165). In June of 1977, Petitioner had a second hearing to contest her nonrenewal at which she was represented by counsel. (1 SF 170-71; PX 19 at 246-48, 397-402). Petitioner's part-time administrative position was eliminated prior to the beginning of the 1977-78 school year by consolidation of Respondent school districts. (1 SF 165, 167; PX 19 at 402-03. Finally, Myrtle Springs' *discharge* policy required notice of unsatisfactory service by May 1 (PX 19 at 388), but the ***nonrenewal*** policy did not require notice by any specific date, contained no good cause requirement and allowed, but did not require, a hearing before nonrenewal. (PX 19 at 380).

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REASONS WHY THE WRIT SHOULD BE DENIED

There is a substantial question whether Petitioner's alleged due process issue was presented to *and* decided by the state court. Even if it were, the general considerations for Supreme Court review by writ of certiorari, as set out in Rule 17 of the Supreme Court Rules, have not been satisfied. Petitioner relies solely on Rule 17.1(c) in her petition. She claims that the Texas state court decision in this case conflicts with *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) and other procedural due process decisions of this Court, but as will be shown below, there is no procedural due process issue and no conflict. Petitioner has attempted to create such an issue by misrepresenting and mischaracterizing the record, and this attempt should be rejected for the abuse of the system that it is. There is no conflict between this case and the decisions of this Court. The petition for writ of certiorari is frivolous and should be denied.

Petitioner Hogan represents to the Court that this case presents an issue of constitutional due process under the fourteenth amendment to the United States Constitution, and she correctly cites *Cleveland Board of Education v. Loudermill, supra,* for the proposition that a public employer must give a contract employee notice and an opportunity to be heard prior to *termination* of employment during the contract's term. Respondents did not, however, terminate Petitioner's employment, and the Petitioner's case, stripped of its mischaracterizations, does not present a constitutional issue and should not be reviewed by this Court.

It is undisputed that Respondent Myrtle Springs Reverted Independent School District employed Petitioner Hogan for the 1976-77 school year on a ten-month term contract, and it is equally undisputed that Petitioner served the entire term of her contract for the 1976-77 school year as elementary teacher and part-time principal. Finally, Petitioner admitted at trial that she was given notice and a hearing, at which she was represented by counsel, on May 9, 1977, which was *prior* to the expiration of her contract term. No fourteenth amendment issue is presented by these facts, and Petitioner's mischaracterization of the nonrenewal of her part-time administrative duties as a dismissal or a termination or a removal is not supported by the record.

The very cases cited by Petitioner recognize the well-settled principle that state law determines whether a property right exists. *E.g., Board of Regents v. Roth,* 408 U.S. 564 (1972). *Accord, Bishop v. Wood,* 426 U.S. 341 (1976). Under Texas law applicable in 1977, a public employee employed on the basis of a term contract had no expectation of continued employment beyond the term of the contract.[1] *E.g., Siler v. Brady Independent School District,* 553 F.2d 385 (5th Cir. 1977); *Skidmore v. Shamrock Independent School District,* 464 F.2d 605 (5th Cir. 1972); *Hix v. Tuloso-Midway Independent School District,* 489 S.W.2d 706 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). In 1977 this was true even if the

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[1] Effective August 31, 1981, the Texas Legislature enacted the Term Contract Nonrenewal Act, TEX. EDUC. CODE ANN. §§ 21.201-.211, which for the first time gave Texas public school teachers and administrators procedural rights prior to nonrenewal of their term contracts.

school district had an express or implied policy, as Petitioner contends Respondent Myrtle Springs did, of automatically renewing the contracts of teachers whose performance was satisfactory. *Id.* Whether a property interest has been created by express or implied contract is a matter of state law, *Bishop v. Wood, supra,* and the sort of tenure Petitioner contends she had by virtue of an automatic renewal provision in a personnel policy or practice did not exist in 1977 as a matter of Texas law. *Siler v. Brady Independent School District, supra; Hix v. Tuloso-Midway Independent School District, supra.* This principle of Texas law recently was reaffirmed twice by the Fifth Circuit Court of Appeals in cases substantially similar to the instant case. *Wells v. Hico Independent School District,* 736 F.2d 243 (5th Cir. 1984), *cert. dismissed,* — U.S. —, 106 S.Ct. 11 (1985); *Burris v. Willis Independent School District,* 713 F.2d 1087 (5th Cir. 1983). Nonrenewal of a term contract in 1977 under Texas law simply does not present a question of federal due process of law, and the Court should not review this case.

Petitioner contends, however, that the personnel policies of Respondent Myrtle Springs created a property interest which entitled her to reemployment for the 1977-78 school year. First, as the cases cited above demonstrate conclusively, any such automatic renewal policy—although Respondents state emphatically that the nonrenewal section of the policy contained no just cause requirement and no automatic renewal provision—was contrary to Texas law and was void. More important, Petitioner received notice of the reasons for her nonrenewal and had an opportunity to refute those reasons at a public hearing, at which she was represented by counsel, prior to the expira-

tion of her contract. This is all the process the fourteenth amendment requires, even for the *termination* of tenured public employment, and certainly no more was required for the nonrewenal of a term contract in 1977. *Cleveland Board of Education v. Loudermill, supra. Accord, Seifert v. Lingleville Independent School District,* 692 S.W.2d 461 (Tex. 1985) (explains the procedural requirements for nonrenewal before and after passage of the Term Contract Nonrenewal Act in 1981).

Petitioner's contention actually is that Respondent's alleged violation of procedures which went beyond the constitutional minimum of notice and a hearing constitutes a separate violation of due process. This contention has been expressly rejected numerous times by the Fifth Circuit Court of Appeals. If the United States Constitution does not require a certain procedure, failure to adhere to that procedure is not a violation of the fourteenth amendment. *United States v. Caceres,* 440 U.S. 741 (1979); *Brown v. Texas A & M University,* 804 F.2d 327 (5th Cir. 1986); *Levitt v. University of Texas at El Paso,* 759 F.2d 1224 (5th Cir. 1985), *cert. denied sub nom., Levitt v. Monroe,* — U.S. —, 106 S.Ct. 599 (1985). Petitioner alleges nothing more than violations of procedures which were over and above the constitutional minimum, and she does not allege facts which constitute a violation of the fourteenth amendment to the United States Constitution.

REQUEST FOR DAMAGES AND DOUBLE COSTS

Rule 49.2 of the Rules of the Supreme Court permits the Court to award a respondent appropriate damages when a petition for writ of certiorari is frivolous. Petitioner and her counsel, in an attempt to avoid the state court's decision on the theory she chose and to avoid well-settled Texas and federal law, have misrepresented the record to this Court and have tried to create a federal issue where none exists. In addition, Petitioner and her counsel have ignored Texas and federal law which clearly demonstrates that her due process contention is frivolous. The petition filed with this Court further multiplied the proceedings in this case unreasonably and vexatiously. Therefore, Respondents respectfully request that they be awarded damages pursuant to Rule 49.2 in an amount equal to their attorneys' fees in responding to this petition and double costs pursuant to Rule 50.7. In addition, Respondents request pursuant to 28 U.S.C. § 1297 that Petitioner's counsel be made liable for the excess costs and attorneys' fees caused by the petition.

CONCLUSION

The petition for writ of certiorari is based on false premises: that Petitioner was terminated from employment and that she litigated a federal due process issue. Petitioner tried this case as a breach of contract case, and the Texas Court of Appeals expressly held that the trial court did not base its judgment on procedural due process. *Myrtle Springs Reverted Independent School District v.*

Hogan, supra, 705 S.W.2d at 711 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.). The Texas Supreme Court did not disturb this holding or the holding of the Court of Appeals that the trial judge improperly awarded loss of earning capacity damages in a breach of contract case. Petitioner did not have a property interest in continued employment in her part-time administrative duties for 1977-78, but even if she did, Respondent Myrtle Springs gave her notice and a hearing to contest her nonrenewal prior to the expiration of her term contract. There is no procedural due process issue presented by this case, and the Texas Supreme Court's decision is not in conflict with any decision of this Court. There are no important national issues which should be decided by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

McGinnis, Lochridge & Kilgore
Shannon H. Ratliff
James R. Raup
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

By Shannon H. Ratliff
State Bar No. 16573000

Attorneys for Respondents